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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 707

PAUL E. BEITER

Petitioner,

vs.

CHARLES ERB and LOUIS FRANKEL

Respondents.

PETITION FOR A REHEARING FROM THE COURT'S DENIAL OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States.

The Court having denied the Petition of Paul F. Beiter for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit prior to the time that he was able to prepare and file a Reply to the Respondents' Brief. Said Paul F. Beiter wishes respectfully to point out certain defects in the Respondents' Brief to the Court and to ask on the basis of said defects for a Rehearing from the Court's denial of his Petition for a Writ of Certiorari.

I.

ANSWER TO RESPONDENTS' PRELIMINARY STATEMENT AND A SUMMARY RE-STATEMENT OF THE FACTS AND ISSUES.

It appears that the Respondents are attempting to persuade the Court that the Petitioner has tried to mislead it by an incomplete statement of the facts of the case.

In reply to this inference, the Petitioner has only to say that he furnished the Court a transcript of a substantial part of the proceedings in the Trial Court, which transcript contained all the pleadings filed by both the Petitioner and the Respondents in that Court, and that he also furnished an Appendix to his Petition for a Writ of Certiorari in which is included the opinion of the United States Court of Appeals for the Seventh Circuit in which is included a statement of all the material allegations of The Answer and The Complaint in the Trial Court.

In the light of this, the Petitioner says that even if he were inclined to try to mislead the Court, it would be extremely presumptuous of him to attempt to do so in the face of the record which he has made available to it.

II.

ANSWER TO RESPONDENTS' ARGUMENT.

(A) The Petitioner points out that the statement made by the Respondents that he (The Petitioner) has based his entire argument on the case of *Rost* v. *Noble*, 316 Ill. 357, is untrue. The Petitioner also cited in support of his position the decision of The Illinois Supreme Court in the case of *Bulpit* v. *Matthews*, 145 Ill. 345, 34 N.E. 525 (Petition for Writ of Certiorari, Pages 5, 9, 11, 12, 13, 14, Appendix to the Petition for Writ of Certiorari 10a).

(B) The Respondents state that the Supreme Court of Illinois has not had Chapter 8, Section I before it since the Enactment of the 1931 Proviso. Petitioner holds that this fact makes the decision of *Bulpit* v. *Matthews* still the law. The first part of Chapter 8, Section I, which was before the Court in the *Bulpit* Case, was not altered by the 1931 Proviso. Therefore, the decision of the Court in the *Bulpit* case concerning the first part of Chapter 8, Section I of the Illinois Statutes stands and will stand until such time as the Illinois Supreme Court overrules itself on the issue.

At the time of the *Bulpit* v. *Matthews* case, 145 Ill. 345 (Appendix 10 a), Chapter 8, Section I, Illinois Statute read:

Prohibits Certain Animals Running at Large

Hereafter it shall be unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese, to run at large in The State of Illinois. 1895 June 21, Laws 1895, P. 4, § I.

After the addition of the 1931 Proviso, the Statute read as follows:

Prohibits Certain Animals Running at Large

Hereafter it shall be unlawful for any animal of the species of horse, ass, mule, cattle, sheep, goat, swine or geese to run at large in the State of Illinois: Provided that no owner or keeper of such animals shall be liable for damages in any Civil Suit for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large 1895, June 21, Laws 1895, P. 4, § I, 1931, May 25, Laws 1931, P. 13, § I.

The 1931 Proviso does not purport to confer legal status on an animal running at large. As pointed out by the Petitioner in his Petition for Writ of Certiorari (Page 12) The Proviso merely created a defense to a Civil Action brought under The Statute, which defense could be interposed without any reference to the accident which gave rise to the Action.

(C) The Respondents say that Chapter 8, Section I, does not create a new form of action or a Statutory action. The Petitioner, again citing the Case of *Rost* v. *F. H. Noble,* 316 Ill. 357, says that it does. In the *Rost* Case the Civil action was based on a statute which made an act unlawful which had previously been lawful; the hiring of a person, in industry, under a certain age. In this case, Chapter 8, Section I likewise made a previously lawful act unlawful; the running at large of certain types of animals. Therefore, it created, just as the Child Labor Law involved in the *Rost* Case did, a new basis for a Civil Action.

(D) The Respondents state (Page 3, Paragraph 3) that Petitioner did not allege or prove that a cow was running at large with the knowledge of the Respondents.

The Respondents do not see that the illegality of the animals being at large is one of Status. The act of its being at large is made illegal by the plain words of the act. The fact that the owner does not know of its being at large does not change the status of an animal running at large from an illegal one to a legal one. An Officer of the Law apprehending the animal running at large would be bound to remove it from the highway, whatever the reason for its being there (*Bulpit* v. *Matthews,* 145 Ill. 345, Appendix 10a).

E. The Petitioner pointed out in his Petition for a Writ of Certiorari that the Respondents had been successful in urging upon the Court of Appeals the idea that this action was one based on negligence and not on a criminal misdemeanor as in the *Rost* case cited by the Petitioner, and they are now urging the same idea on this Court. The idea is apparently based on the words in the Petitioner's Complaint that are quoted in the opinion of the Court of Appeals (Appendix to Petition for Writ of Certiorari, P. 2a): "That as the proximate consequence of the negligence of the Defendant in violation of said Statute in allowing said cow to be at large and upon the highway, the said cow and the automobile operated by the Plaintiff collided and Plaintiff was thrown down and injured . . ."

These words, however, referred to the Second Portion of Chapter 8, Section I of the Illinois Statutes known as the Proviso, which concerns itself with the question of care used in confining animals. If it referred to the part of the Statute preceding the Proviso it would be a nullity or a superfluity as that part of the Statute by its plain wording makes it illegal for the animal to be at large regardless of negligence or other circumstances (*Bulpit* v. *Matthews,* 145 Ill. 345).

The Petitioner set forth in full in his Complaint the text of Chapter 8, Section I of the Illinois Statutes and he regards that fact as ample evidence that his Complaint, taken as a whole, evidenced an unmistakable intention to claim the benefit of the Statute. (Transcript District Court Record, pp. 5, 9)

Without enlarging further here the Petitioner respectfully refers the Court to his Petition for a Writ of Certiorari, P. 12, at which place is discussed the manner in which an action brought under the Statute in question differs from a straight Common Law Action.

CONCLUSION.

In Illinois, The Defense Bar has come to worship at the Shrine of the Deity "Contributory Negligence." The Shangri-La it dreams of is a land where all plaintiffs and prospective plaintiffs are required, by the law, to be eternally prepared to meet at any instant any eventuality which may take place at any point in the Universe, or else be condemned to stand trembling before the Bar of Justice as the Great God "Contributory Negligence" booms in stentorian tones the awful words, "No Recovery."

However, as someone has said, "Everything is too much." To require everyone to be prepared for everything would paralyze them rather than protect them, and the Law of Illinois makes no such monstrous requirement. One of the things the public in Illinois is not required to be in readiness for, is the commission of a crime (be it heinous or non-heinous) *Rost* v. *F. H. Noble & Company,* 316 Ill. 357, and the Petitioner accordingly asks the Court to grant him a Rehearing from its order denying his Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GEORGE S. GEFFS,
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Janesville, Wisconsin
Attorney for Petitioner.

CLELAND P. FISHER,
Jackman Building,
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THOMAS U. FLANNER,
134 South LaSalle Street,
Chicago 3, Illinois,
Of Counsel.

CERTIFICATE.

The Petitioner certifies that this Petition for a Rehearing is filed in good faith and not for the purpose of delay.

The Petitioner also certifies in accordance with Rule 58(2) of the Rules of this Court that this Petition is based on intervening circumstances of substantial character in the form of the Respondents' Brief in opposition to his Petition for a Writ of Certiorari in that said Brief contains (1) An insinuation that Petitioner's exposition of the facts of the case in his Petition was misleading to the Court and (2) A mis-statement of fact; that Petitioner's case was based on a single decision of the Illinois Supreme Court.

The Petitioner believes that assertions such as the above may well influence a Court in arriving at its decision and that he is entitled to answer them.

GEORGE S. GEFFS,
Attorney for Petitioner

By THOMAS U. FLANNER,
Attorney for Petitioner.

CERTIFICATE.

The undersigned hereby certifies that the above Petition or a Rehearing is presented in good faith and not for delay.

GEORGE S. GEFFS,
Attorney for Petitioner

By THOMAS U. FLANNER,
Attorney for Petitioner.